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In The

Supreme Court of the United States

October Term, 1975

No. 75-1020

PAULA DALLAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KENNETH KAPLAN
Attorney for Petitioner
666 Fifth Avenue
New York, New York 10019
(212) 581-2375

(88373)
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In The

Supreme Court of the United States

October Term, 1975

No.

PAUL DALLAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Paula Dallal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 19, 1975, affirming petitioner's conviction in the United States District Court for the Eastern District of New York (Appendix A, *infra*, 1a).

OPINIONS BELOW

No opinion was rendered by the Court of Appeals or by the District Court.

JURISDICTION

The jurisdiction of the Court is invoked under provisions of 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The indictment upon which petitioner was tried and convicted alleged violations of 18 U.S.C. §2 and 21 U.S.C. §§ 841(a)(1), 846.

QUESTION PRESENTED

Was the court's charge on the issue of entrapment defective and did it deprive the petitioner of a fair determination of a crucial issue in the case?

STATEMENT

Petitioner's conviction in the United States District Court for the Eastern District of New York for distribution and conspiracy to distribute cocaine hydrochloride was affirmed by the Court of Appeals for the Second Circuit, without opinion.

Petitioner was charged in Count 1 of the indictment with distribution of approximately three-quarters of an ounce of cocaine hydrochloride, in Count 2 with distribution of approximately one ounce of cocaine hydrochloride and in Count 4 with conspiracy to distribute quantities of cocaine hydrochloride.

Alfred Cavuto, a special agent with the Drug Enforcement Administration testified that a government undercover informant was given $800 to introduce him (Cavuto) to the petitioner, who in turn introduced him to one O'Brien from whom drug purchases were made. He called and spoke to the petitioner twelve or thirteen times importuning her to aid him in purchasing cocaine.

Petitioner testified she was 23 years of age and never before in trouble; that the government through its agent Cavuto and informant Jeff initiated an unremitting barrage of calls and visits to enmesh her in the commission of a crime. Jeff called her approximately twenty times and visited her apartment eight times cajoling her to get cocaine for his friend Al (Cavuto). The informant Jeff relentlessly continued to entreat and implore her to get cocaine for his "friend" notwithstanding that she would tell him that she was unable to do it. He called her four and five times a day. She testified that the calls were so frequent and the demands so incessant that in order to avoid further contact she pretended she had to visit a sick father in Japan, and that ". . . the only way I could think they would leave me alone was if I told them I was going to Japan . . . ." She continued, "...Can't you just leave me alone . . . ."

She instructed her roommate to tell him that she was out. Similarly, Cavuto, in this attempt to have petitioner affect an introduction with the seller O'Brien spoke to her fourteen or fifteen times.

She further testified that she uses barbituates; that she dealt with the seller O'Brien once before and offered to sell agent Cavuto marijuana and amphetamines.

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REASON FOR GRANTING THE WRIT

The Court's instructions to the jury on the subject of entrapment was fatally defective in that it failed to properly place the burden on the government to disprove the whole defense; thus depriving the petitioner of a fair trial.

Since the proof indicated that the government initiated the events charged in the indictment, the petitioner raised the defense of entrapment on that subject, the court incorrectly charged the jury over counsel's objection. Thus:

> ". . . The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. That is, did the government initiate the criminal transaction? On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt but he must prove it by a fair preponderance more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.
>
> The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to

> commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt. . . ."

The Court in the case *United States v. Braver*, 450 F.2d 799 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972), approved the language in *United States v. Berger*, 433 F.2d 680, 684 (2d Cir. 1970), *cert. denied*, 401 U.S. 962, that a defendant had to:

> "[A]dduce some evidence that a government agent by initiating the illegal conduct himself induced the defendant to commit the offense. If you find that the defendant . . . has adduced such evidence then the government must prove beyond a reasonable doubt that the inducement was not the cause of the crime, that is, that the defendant . . . was ready and willing to commit the offense."

The Court in *Braver* continued on pp. 804 and 805:

> "In light of all of this, we suggest that it would be preferable for the district courts of this circuit to use an entrapment charge that does not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two different parties. While we do not specifically define this preferable charge, we suggest that there be no reference to 'burden' or 'burden of proof' or 'preponderance of evidence' in describing a defendant's obligation. In

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> explaining the burden of proof on entrapment, it will be enough to tell the jury that if it finds some evidence of government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime. The language quoted from *United States v. Berger, supra,* would obviously be appropriate."

Notwithstanding this clear instruction, the trial judge instructed the jury that on the issue of the government's initiation of the criminal transaction, ". . . the defendant has the burden of proof . . ." and ". . . must prove it by a fair preponderance of the evidence."

Other circuits have indicated their preference for the unitary charge, that is, they have approved entrapment instructions that do not separate the issues of inducement and propensity and do not impose a burden on the defendant to prove any element of the entrapment defense by either a "burden of proof" or "preponderance."

"The issues having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense," *Notaro v. United States,* 363 F.2d 169 (9th Cir. 1966). See *Kadis v. United States,* 373 F.2d 370 (1st Cir. 1967); *United States v. Cohen,* 431 F.2d 830, 832 (2d Cir. 1970); *United States v. Riley,* 363 F.2d 955, 958-959 (2d Cir. 1966); *United States v. DeVore,* 423 F.2d 1069 (4th Cir. 1970); *Robinson v. United States,* 366 F.2d 575 (10th Cir. 1966); *Lucas v. United States,* 355 F.2d 245 (10th Cir. 1966).

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In *United States v. Watson*, 480 F.2d 504 (3rd Cir. 1973) the Court held at pages 510 and 511:

> "This court has never had to directly face the question of whether the giving of the bifurcated charge constitutes error. However, we have indicated our preference for a unitary charge. In United States v. Silver, 457 F.2d 1217 (3d Cir. 1972), we called it a 'settled principle' that 'when the defense of entrapment is properly raised the burden of proof is on the Government to prove beyond a reasonable doubt that the defendant was not entrapped'" 457 F.2d at 1220.
>
> "Furthermore, in Government of the Virgin Islands v. Cruz, 478 F.2d 712 (3d Cir. 1973), decided after the district court decision in this case, we approved of an instruction which places the burden on the Government to disprove the whole defense beyond a reasonable doubt.
>
> Under the unitary approach we require, inducement therefore enters as an element of predisposition which the Government must disprove rather than as an independent element which the defendant must prove.
>
> Pragmatic considerations also inhibit us from approving an entrapment charge involving two elements, with different burdens of proof on different parties for each element. We see no

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> valid justifications for imposing such a confused standard on a jury in a criminal case for a judicially created defense which, as pointed out above, involves essentially a single element. Indeed, we are supported in this view by the Government brief in this case which concedes that 'it must fairly be said that the initial treatment in the charge of the entrapment issue could generate confusion on the part of the jury.'"

The trial court's error in charging the jury deprived the petitioner of a fair determination of the issues.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

s/ Kenneth Kaplan
Attorney for Petitioner

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APPENDIX A

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of December, one thousand nine hundred and seventy-five.

Present:

HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

CARLOS FAYAD and PAULA DALLAL,

Appellants.

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Judgment of Court of Appeals

75-1343

Appeal from the United States District Court for the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is *affirmed*. The mandate shall issue forthwith.

s/ Paul R. Hays
PAUL R. HAYS

s/ William H. Timbers
WILLIAM H. TIMBERS

s/ Murray I. Gurfein
MURRAY I. GURFEIN

Circuit Judges.